A

# CIMB BANK BHD

v.

# KHAIRUDIN DAMHOERI

B

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH JC
[SUIT NO: D7-22-5-2007]
9 DECEMBER 2010

C ***BANKING:*** *Banker and customer - Amount outstanding - Certificate of Indebtedness issued by the plaintiff - Whether there had been fraud or forgery in its issuance - Evidence adduced - Effect of - Whether there had been a 'manifest error' - Evidence Act 1950, s. 90A(2)*

D ***CIVIL PROCEDURE:*** *Action - Striking out - First suit struck off for non-attendance of parties - Whether the plaintiff's had been estopped from bringing this claim*

***CIVIL PROCEDURE:*** *Limitation - Defendant raising defence of time bar against plaintiff's claim - Whether plaintiff's claim time barred -* E *Defendant's conduct in the matter - Factors to consider - Effect of - Limitation Act 1953, s. 6*

***CIVIL PROCEDURE:*** *Service - Letter of demand - Overdraft facility - Whether the defendant had received the second letter of demand -* F *Factors to consider - Provisions of the overdraft facility - Effect of*

***EVIDENCE:*** *Burden of proof - Fraud alleged in a civil case - Whether discharged by the defendant*

G ***LIMITATION:*** *Overdraft - Accrual of cause of action - Whether plaintiff's claim time barred - Defendant's conduct in the matter - Factors to consider - Effect of - Limitation Act 1953, s. 6*

The plaintiff had granted an overdraft facility to the defendant subject to all the terms and conditions contained in the Letter of H Offer and the Overdraft Facility Agreement dated the 4 April 1997 and 11 April 1997 respectively ('OD'). The defendant defaulted on his payments thereunder and a letter of demand ('LOD') was issued to him in 1998. The defendant approached the plaintiff and an understanding was reached between the parties wherein the I defendant was requested to regularize his accounts. Unfortunately he failed to do so and the OD and his other accounts were recalled by the plaintiff. A summons was filed and served against

him. The defendant once again approached the plaintiff requesting for time and for conversion of the OD to a fixed loan. The plaintiff allowed the defendant's request and withdrew the summons with liberty to file afresh. However the defendant, despite the indulgences granted to him by the plaintiff, still failed to regularize his payments. Thus the plaintiff issued him a fresh LOD in 2006 together with a Certificate of Indebtedness. The defendant contends that the plaintiff's claim is time barred by virtue of s. 6 of the Limitation Act 1953 as the cause of action accrued in 1998. There were two main issues that arose for consideration before this court. The first was whether the plaintiff's action had been time barred and the second was whether there had been a manifest error on the Certificate of Indebtedness issued by the plaintiff.

**Held (plaintiff's claim allowed):**

**(1)** On the issue of whether the claim had been time barred, the important question had been which LOD had constituted the demand *ie*, the LOD issued in 1998 or the LOD issued in 2006. The first summons had been filed based on the LOD issued in 1998. Thus the withdrawal of the first summons had constituted a corresponding withdrawal or revocation of the 1998 LOD. Since the OD facility had been payable on demand, the plaintiff had taken the right course of action by issuing the second LOD in 2006. Applying the principle of law on limitation, in view of the fact that the 1998 LOD had been revoked, time had started to run from the date of the 2006 LOD. Since this writ was filed in 2007, the suit had been well within the limitation period. (paras 38, 48-49)

**(2)** There had been letters by the defendant seeking extensions of time to settle overdue amounts on his accounts even as late as 2000. As such, after the first summons had been withdrawn, time had only started to run after the 2006 LOD had been issued. (para 51)

**(3)** The first summons had been struck off due to the non appearance of the parties and as such the suit had not been heard on its merits. Based on the authority of *Malayan Assurance Alliance Berhad v. Then Fah Chin*, the plaintiff had not been estopped from bringing this claim against the defendant. (para 53)

A **(4)** On the defendant's contentions that he had never received the 2006 LOD, cl. 43.1 had provided that any demand could be effectively made by sending the notice to the defendant at his usual or last known address and any demand sent by post shall be deemed to have been sufficiently served. Thus the
B plaintiff had discharged its duty by showing proof of posting of the 2006 LOD. The defendant had also failed to show that the 2006 LOD had not been addressed to him at his usual or last known address and he had admitted in cross-examination to not notifying the plaintiff of a change of address. Thus he
C could not now deny receiving the 2006 LOD. (paras 56, 58)

**(5)** On the issue of whether the Certificate of Indebtedness had proven the plaintiff's claim, based on the authorities presented, an exclusive evidence or conclusive evidence clause would have
D entitled the plaintiff to rely solely on the certificate signed by an officer of the bank as conclusive evidence of the amount due and owing from the defendant where there had not been a manifest error on the face of the statement of accounts or certificate. Based on the Certificate of Indebtedness and the
E evidence adduced by the plaintiff, the plaintiff had proven the existence of facts in favour of its case and the burden had shifted to the defendant to discharge. (paras 62-63)

**(6)** The fact that the statement of accounts which had been in
F the plaintiff's computer records and which had been examined by PW2 had later been re-printed on the Bumiputera-Commerce letterhead had not constituted "manifest error". PW2 had been a competent witness. Thus the defendant's contention that the Certificate of Indebtedness had not
G complied with s. 90A(2) of the Evidence Act 1950 had been without merit. (paras 67 & 69)

**(7)** The burden of proving fraud in a civil case is beyond reasonable doubt. The Federal Court case of *Ang Hiok Seng v. Yim Yut Kiu* states that an allegation of criminal fraud in
H civil or criminal proceedings cannot merely be based on suspicion or speculation. From the evidence, the defendant had not discharged this burden. Further, the issue of fraud and the tempering of the account had never been pleaded or put to the plaintiff's witnesses. (paras 73 & 75-76)

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**Case(s) referred to:**

*Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497* ***(refd)***
*Arab Malaysian Finance Bhd v. Kah Motor Co Sdn Bhd & Another Case [2010] 1 LNS 359 CA* ***(refd)***
*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***
*Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134* ***(refd)***
*Citibank NA v. Ooi Boon Leong [1980] 1 LNS 168* ***(refd)***
*EON Bank Berhad v. Mohd Yunus Alias & Ors [2009] 1 LNS 419 HC* ***(refd)***
*Goh Hooi Yin v. Lim Teong Ghee [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 HC* ***(refd)***
*How Paik Too v. Mohideen [1967] 1 LNS 57 FC* ***(refd)***
*International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC* ***(refd)***
*Lee Cheong Fah v. Soo Man Yoh [1996] 2 BLJ 356* ***(refd)***
*Malayan Assurance Alliance Berhad v. Then Fah Chin [1997] 1 LNS 464* ***(refd)***
*Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC* ***(refd)***

**Legislation referred to:**

Bankers' Books (Evidence) Act 1949, ss. 4, 5
Evidence Act 1950, ss. 34, 90A(2), 115
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 14

*For the plaintiff - Joanne Lazaroo; M/s Amin, Yap & Co*
*For the defendant - Yusrin Faidz; M/s Faidz Leong & Chong*

*Reported by Sharmini Pillai*

## JUDGMENT

**Hanipah Farikullah JC:**

**[1]** The plaintiff, CIMB Bank, claims against the defendant as borrower of an Overdraft Facility Agreement dated 11 April 1997. It is the plaintiff's case that the defendant is under a contractual duty to make payments to the plaintiff and that the defendant has breached the terms of the Overdraft Facility Agreement by his failure to make payments as and when they fall due. The amount outstanding as at 7 December 2006 is RM483,612.51 based on the Certificate of Indebtedness issued by the plaintiff. The defendant contends that the plaintiff's claim has been time barred under s. 6 of the Limitation Act as the cause of action of the overdraft facility accrued on 14 September 1998.

**[2]** The overdraft facility was granted to the defendant by Bank Bumiputra Malaysia Berhad. The assets and liabilities of Bank Bumiputra Malaysia Berhad ("BBMB") were acquired by Bank of Commerce (M) Berhad *vide* a Vesting Order dated 3 September 1999. (p 4-54 bundle A, exh. P32). Bank of Commerce (M) then changed its name to Bumiputera-Commerce Bank Berhad (p. 56 bundle A, exh. P33) and Bumiputera-Commerce Bank Berhad then changed its name to CIMB Bank Berhad (p. 58 bundle A, exh. P34).

## The Plaintiff's Case

**[3]** The plaintiff's witness, Rozita binti Abdul Aziz (PW1), Head of Credit of Bank Bumiputra at the material time (1998-1999) testified that the plaintiff granted an overdraft facility of RM200,000 to the defendant subject to the terms and conditions in the letter of offer dated 4 April 1997 and the Overdraft Facility Agreement dated 11 April 1997.

**[4]** PW1 pointed out that the defendant held three (3) different accounts with BBMB namely:

(i) The overdraft facility for RM200,000

(ii) Fixed loan for RM39,000

(iii) Housing loan for RM88,880

**[5]** PW1 in her evidence said that sometime in early 1998 the defendant defaulted in the repayment of the overdraft facility. *Vide* a letter dated 17 June 1998 from the Head Office of BBMB to the branch, the Head Office informed that BBMB intended to monitor or supervise the defendant's three (3) accounts.

**[6]** *Vide* a letter dated 23 June 1998, the branch furnished to the Head Office of BBMB a full position report in respect of the defendant's overdraft facility.

**[7]** Subsequently, the Branch issued four (4) reminder letters to the defendants to regularize his overdraft facility account (pp. 226, 228, 230 and 230 of BOD).

**[8]** As the defendant had failed to make payment, the Branch instructed its previous Solicitors Messrs Halim & Ismail to issue a demand *vide* its letter of instruction dated 17 August 1998 (pp. 234-235 BOD).

**[9]** Subsequently, *vide* a letter of demand dated 14 September 1998 (pp. 240-242 of BOD), Messrs Halim & Ismail issued a demand for the whole outstanding amount of the overdraft facility of RM205,281.59 to the defendant. A

**[10]** PW1 explained that at the same time, there was an approval by the Head of Branch Operations BBMB and the Head of Corporate Banking dated 15 September 1998 and 17 September 1998 respectively (p. 244 of the BOD) in respect of a review of all three (3) of the defendant's accounts. This was because the defendant had come to meet PW1 to discuss his accounts. According to PW1, the practice and procedure of any bank is that when one account is reviewed, all other accounts held by the same bank customer must be reviewed together. This is a Bank Negara Guideline. B C

**[11]** *Vide* a letter dated 24 September 1998 (p. 246 of BOD), the Head Office of BBMB informed the Branch that the Credit Committee of BBMB had resolved that all three (3) of the defendant's accounts were to be recalled if the excess on all three (3) accounts were not regularised by 31 October 1998. D E

**[12]** BBMB wrote to the defendant *vide* a letter dated 28 October 1998 (p. 284 of the BOD) requesting that he regularise all three (3) accounts before 31 October 1998.

**[13]** As the defendant did not make payment, the Head Office wrote to the Branch a letter dated 5 November 1998 (p. 252 BOD) instructing the branch to recall all three (3) accounts. F

**[14]** In the meantime, PW1 said that Messrs Halim & Ismail had *vide* a letter dated 15 October 1998 (p. 3 of bundle C) informed the Branch that a Summons (p. 4-11 of bundle C) had been filed on 14 October 1998 (Summons No 52-20151-1998). G

**[15]** PW1 informed the court that the said Summons was served on the defendant *vide* a letter dated 22 March 1999 (p. 15 of bundle C) and the proof of posting is at p. 16. After the defendant knew of the said proceeding, PW1 said the defendant came to see her on or about 27 April 1999. H

**[16]** At p. 207-212 of the BOD is a letter from the defendant to the Branch dated 27 April 1999 enclosing a "Surat Tawaran Jawatan sebagai Pensyarah Utama di UNITEN" dated 2 February I

1999. The defendant informed PW1 that he had just gained employment with UNITEN and he requested that the overdraft facility be converted into a fixed loan.

**[17]** Subsequently, the defendant's letter was forwarded to the Head Office by the Branch *vide* a letter dated 29 April 1999 (p. 214 BOD). It was then that BBMB decided that it would cease legal action against the defendant. The bank then later wrote a letter dated 19 May 1999 (p 216 BOD) to the defendant requesting that he support his request to convert the Overdraft Facility into a fixed loan.

**[18]** PW1 testified that BBMB had ceased legal action against the defendant at that time based on his proposals and promises and the fact that he had secured employment as UNITEN Head lecturer. BBMB was of the view that the defendant's prospects of changing his accounts into performing loans were actually very bright. BBMB also wanted to give the defendant a chance to regularise his accounts.

**[19]** Later in 2000, PW1 said there was a letter from the defendant's solicitors dated 6 June 2000 enclosing the defendant's letter dated 27 May 2000 (p. 17-21 bundle C) where at p. 18, para. 2, he wrote and I quote:

> Terlebih dahulu saya ucapkan berbanyak terima kasih di atas simpati dan keprihatinan pihak bank yang telah ditunjukkan selama ini di dalam menangani masalah pembayaran balik kemudahan saya.

He also wrote at p. 20 para. 6.2 and 6.3

> Seperti di dalam surat rayuan saya bertarikh 27.5.1999 dulu, sekali lagi saya merayu supaya pinjaman oberdraft ditukar kepada bentuk "fixed loan" dan separuh dari jumlah tersebut dilupuskan. Penukaran bentuk pinjaman dari bentuk oberdraf kepada fixed loan adalah penting dalam usaha saya membayar balik pinjaman bank, kerana tambahan bulanan faedah/bunga akan membesarkan jumlah terhutang saya, dan seterusnya menyulitkan usaha saya membayar balik.
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> **Bank tidak mengenakan kos guaman ekoran saman yang dibuat terhadap saya.** Kos tersebut adalah terlalu besar dan jika pihak bank mengenakannya terhadap saya, ianya akan membesarkan jumlah terhutang saya dengan bank, yang mana akhirnya akan menyulitkan pembayaran balik.

**[20]** It is the plaintiff's case that subsequently, the defendant still did not do anything specifically in respect of the overdraft facility as he knew that BBMB had withdrawn the summons. He was also busy contesting the bank's foreclosure action in respect of the other two (2) accounts all the way to the Court of Appeal where finally, his application for leave to appeal was dismissed.

**[21]** Having seen the entire litigious conduct of the defendant despite the indulgences granted to him, the plaintiff then *vide* its solicitors issued a fresh demand dated 18 December 2006 (p. 109-112) against the defendant in respect of the overdraft facility.

**[22]** The plaintiff also tendered a Certificate of Indebtedness of RM483,612.51 (p. 220 of the BOD) as at 7 December 2006 which has been verified by three (3) of the plaintiff's officers namely the Assistant Manager, Cik Nor Salleizah bt Sallehuddin (PW2), Vice President En Hassan bin Othman and the Recovery Officer Encik Kamarul Anur Jaberi.

**The Defendant's Case**

**[23]** The defendant encountered financial difficulties and have made his final payment towards his overdraft facility with the plaintiff on 14 July 1998 for the sum of RM1,400.

**[24]** From then on, the plaintiff have imposed late payment interest and have instructed Messrs Halim & Ismail to issue a claim for the excess sum of which notice was duly issued on 17 August 1998.

**[25]** As there were no further payment and based on the continuous non-payment, the plaintiff have instructed Messrs Halim & Ismail to issue a letter to recall the overdraft facility *vide* letter dated 14 September 1998.

**[26]** At all materials times, the plaintiff did not retract these instructions or cancel the letter dated 14 September 1998 wherein their intention to recall the said overdraft facility and the *status quo* of parties remained.

**[27]** As such, the breach of the said overdraft facility occurred on 14 September 1998 and by virtue of s. 6(1)(a) of the Limitation Act 1953, the remedy against the said breach have been time barred six (6) years from that date which falls on 14 September 2004.

**[28]** There is no further payment made by the defendant after his final payment on 14 July 1998 and the said overdraft facility was duly recalled on 14 September 1998.

**[29]** The plaintiff filed the writ of summons against the defendant on 3 January 2007 based on a new letter of demand issued by Messrs Halim & Ismail on 18 December 2006. Hence, the defendant contends that the said new letter of demand does not have the effect of reviving the time barred action as the plaintiff's claim which is based on a breach of contract has been time barred with effect from 14 September 2004. As such, the writ and statement of claim remained time barred as it was filed eight (8) years after the date of breach.

**[30]** The defendant also contends that the remedy and cause of action could not have been revived by virtue of continuation of contractual relationship between parties and as such the plaintiff's remedy against the defendant has and will always be time barred commencing from 14 September 2004.

**Issue**

**[31]** It is not disputed between the parties that the defendant has defaulted the terms and conditions of the Overdraft Facility Agreement. From the pleadings and the evidence adduced, it is clear that the issues to be considered are as follows:

(i) Whether the plaintiff's action is time barred

(ii) Whether there is manifest error on the Certificate of Indebtedness by the plaintiff

**Whether The Claim Was Time Barred**

**[32]** The Overdraft Facility Agreement entered into between the plaintiff as lender and the defendant as borrower was for a sum of RM200,000. The defendant did not dispute the non-payment of the overdraft facility.

**[33]** It is the defendant's submission that the plaintiff's claim is time barred under s. 6 of the Limitation Act 1953. According to learned counsel for the defendant, since the claim in essence is for breach of contract, the claim must be made within six (6) years from the date when the cause of action accrued. It is the

defendant's position that the cause of action accrued when the defendant failed to pay after being reminded by the plaintiff *vide* a letter dated 14 September 1998. Further, the defendant argued that upon the non-payment of the defendant, the facility was duly terminated, recalled and suspended on 14 September 1998 (p. 240-242 of BOD). Since the plaintiff's claim was filed on 3 January 2007, the defendant contends that it was filed about two and a half (2 1/2) years out of time.

**[34]** In response, learned counsel for the plaintiff submitted that cl. 14 of the Overdraft Facility Agreement provides that the said overdraft facility is payable on demand which may be made by the bank at any time at its absolute discretion.

**[35]** The plaintiff also relied on cl. 23 of the Overdraft Facility Agreement which provides that any action by the bank in respect of the default shall not affect or impair any right, power, privilege or remedy of the bank in respect of any subsequent default.

**[36]** Next, the plaintiff submitted that the present action is not precluded by limitation. After the letter of demand dated 14 September 1998 was issued, the plaintiff filed the Session Court Suit *vide* Summons No. 3-52-20151-1998 dated 14 October 1998. Based on reassuring and convincing promises made by the defendant, the summons was withdrawn by the plaintiff's former solicitor on 27 April 1999.

**[37]** The plaintiff further submitted that pursuant to the suit being withdrawn, the defendant had initiated settlement proposals as evident by the plaintiff's letters containing admissions of indebtedness dated 27 April 1999 and 27 May 2000. Thus the demand letter dated 14 September 1998 was revoked pursuant to the said settlement proposals by the defendant and also the decision of the plaintiff to discontinue legal action by withdrawing the suit.

**[38]** On this issue, this is my findings. The cause of action in contract depends on whether there is a breach of any of the contractual terms. Both parties are not disputing that the defendant has breached the Overdraft Facility Agreement by failing to pay on demand. What they do not agree on is which of the plaintiff's letter constitutes the demand, should it be its letter dated 14 September 1999 as submitted by the defendant or its letter of demand dated 18 December 2006 as contended by the plaintiff.

**[39]** From the evidence adduced, the court note that BBMB wrote to the defendant *vide* a letter dated 28 October 1998 (p. 248 of BOD) requesting him to regularised all three (3) accounts before 31 October 1998. As the defendant had done nothing, the Head Office wrote to the Branch a letter dated 5 November 1998 (p. 252 of BOD) instructing the Branch to recall all three (3) accounts. Subsequently upon the instruction of BBMB, Messrs Halim & Ismail had filed a summons in the Session Court (Summons No. 52-20151-1998) in respect of the overdraft facility.

**[40]** From the evidence adduced by PW1, the said summons was served on the defendant *vide* a letter dated 22 March 1999 (p. 15 of bundle C) and the proof of posting is at p. 16 of bundle C.

**[41]** PW1 testified that after the defendant knew of the said summons, since he came to see her on or about 27 April 1999. At the said meeting, PW1 said that the defendant handed over a letter (pp. 207-212 of the BOD) enclosing a "Surat Tawaran Jawatan sebagai Pensyarah Utama di UNITEN" dated 2 February 1999. In his letter dated 27 April 1999, the defendant requested that the overdraft facility be converted into a fixed loan. He also said in his letter that:

> … saya tidak mampu buat masa ini untuk membayarkan interest charges. Insyaallah bila keadaan kembali pulih saya akan sedaya upaya cuba menyelesaikan pinjaman ini. Buat sementara ini, saya harap pihak bank boleh menerima cadangan saya.

**[42]** As the court recalls, the defendant's letter was forwarded to the Head Office by the Branch *vide* a letter dated 29 April 1999 (p. 214 of BOD). It was then that BBMB decided that it would cease legal action against the defendant. The bank then later wrote a letter dated 19 May 1999 (p. 216 of BOD) to the defendant requesting that the defendant write to the bank to support his request to convert the overdraft facility into a fixed loan.

**[43]** *Vide* a letter dated 20 May 1999, the plaintiff requested for supporting documents (p. 218 of the BOD) from the Branch so that BBMB could restructure the overdraft facility. However, there was no reply forthcoming from the defendant.

**[44]** The evidence adduced showed that DW1 informed the court that on 18 May 1999 the summons were struck out with liberty to file a fresh by the Session Court Judge because of non-appearance of all parties. In relation to this, PW1 explained that BBMB had ceased legal action against the defendant at that time based on his proposals and promises and the fact that he had secured employment as UNITEN Head Lecturer. BBMB was of the view that the defendant's prospects of changing his accounts into performing loans were actually very bright. BBMB also wanted to give the defendant a chance to regularise his accounts.

**[45]** As stated earlier, later in 2000, there was a letter from the defendant's solicitors dated 6 June 2000 enclosing the defendant's letter dated 27 May 2000 (pp. 17-21 of bundle C) where at p. 18, para. 2, he wrote and I quote:

> Terlebih dahulu saya ucapkan berbanyak terima kasih di atas simpati dan keprihatinan pihak bank yang telah ditunjukkan selama ini di dalam menangani masalah pembayaran balik kemudahan saya.

He also wrote at p. 20 paras. 6.2 and 6.3

> Seperti di dalam surat rayuan saya bertarikh 27.5.1999 dulu, sekali lagi saya merayu supaya pinjaman oberdraft ditukar kepada bentuk "fixed loan" dan separuh dari jumlah tersebut dilupuskan. Penukaran bentuk pinjaman dari bentuk oberdraf kepada fixed loan adalah penting dalam usaha saya membayar balik pinjaman bank, kerana tambahan bulanan faedah/bunga akan membesarkan jumlah terhutang saya, dan seterusnya menyulitkan usaha saya membayar balik.
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> **Bank tidak mengenakan kos guaman ekoran saman yang dibuat terhadap saya.** Kos tersebut adalah terlalu besar dan jika pihak bank mengenakannya terhadap saya, ianya akan membesarkan jumlah terhutang saya dengan bank, yang mana akhirnya akan menyulitkan pembayaran balik.

**[46]** *Vide* letter dated 27 May 2000 (pp. 17-21 PABOD) the defendant wrote to the plaintiff where at p. 18, para. 2, he stated:

> Terlebih dahulu saya ucapkan berbanyak terima kasih di atas simpati dan keprihatinan pihak bank yang telah ditunjukkan selama ini di dalam menangani masalah pembayaran balik kemudahan saya.

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> Seperti di dalam surat rayuan saya bertarikh 27.5.1999 dulu, sekali lagi saya merayu supaya pinjaman oberdraft ditukar kepada bentuk "fixed loan" dan separuh dari jumlah tersebut dilupuskan. Pemukaran bentuk pinjaman dari bentuk oberdraf kepada fixed loan adalah penting dalam usaha saya membayar balik pinjaman bank, kerana tambahan bulanan faedah/bunga akan membesarkan jumlah terhutang saya, dan seterusnya menyulitkan usaha saya membayar balik.
>
> **Bank tidak mengenakan kos guaman ekoran saman yang dibuat terhadap saya.** Kos tersebut adalah terlalu besar dan jika pihak bank mengenakannya terhadap saya, ianya akan membesarkan jumlah terhutang saya dengan bank, yang mana akhirnya akan menyulitkan pembayaran balik.

**[47]** In the light of the above evidence, can it be concluded that the defendant did not receive the summon filed by the plaintiff's former solicitor, Messrs Halim & Ismail. On this issue, in view of the testimony of PW1 which I find as a credible witness and the defendant's letter dated 27 May 2000, in my judgment, on the balance of probabilities the court finds that the defendant received the summons.

**[48]** Further, the court finds that by BBMB instructing Messrs Halim & Ismail that the said Sessions Court suit be withdrawn, it is clear from the conduct of the parties that the letter of demand dated 14 September 1998 was also revoked or withdrawn. The Sessions court suit was based on the demand dated 14 September 1998. Therefore, the intended withdrawal of the 1998 suit would constitute a corresponding withdrawal or revocation of the 1998 letter of demand.

**[49]** Since the Overdraft Facility is one that is payable on demand, the plaintiff took the proper course of action by issuing the 2006 letter of demand. Applying the principle of law of limitation, it is my view that with the 14 September 1998 demand having been revoked, and since that overdraft facility was repayable on demand, time started to run only from the date the 2006 demand was made on 18 December 2006. Since this writ in this present action was filed on 3 January 2007, the suit is well within the limitation period allowed by law.

**[50]** In the case of *EON Bank Berhad v. Mohd Yunus Alias & Ors* [2009] 1 LNS 419, the defendants requested for time to settle the outstanding amounts. There were several letters signed by the third defendant seeking extensions of time to settle the overdue amount as indicated in the plaintiff's letter dated 25 October 1996. On 14 November 1997, the plaintiff was still writing to the defendants *vide* its representatives to settle the outstanding amounts. The court held that as agreed between the parties under section 15.01, time will not begin to run for recovery until a demand has been made and no waiver or extension of time has been granted. Time therefore cannot start to run until this matter has been resolved.

**[51]** In this present case, there are letters by the defendant seeking extensions of time to settle the overdue amounts of his accounts. In 2000, the defendant was still writing to the plaintiff. After the 1998 suit was instructed to be withdrawn, time therefore did not start to run until the 2006 demand was issued.

**[52]** In *Malayan Assurance Alliance Berhad v. Then Fah Chin* [1997] 1 LNS 464, the court held that the plaintiff was clearly not time barred in bringing the present suit as the cause of action only become upon the demand being made for the payment as no cause of action arose then. The court further said:

> The mere fact that the plaintiff had filed the earlier suit and later withdrawn it, *per se*, would also not attract the defence of *res judicata* which would estop the plaintiff from bringing the present suit. It was not disputed that the earlier suit was never heard on the merits. It was withdrawn for the reason that no cause of action had accrued since the defendant had not been served with the notice of demand. In the [18] circumstances, the purported defence of *res judicata* and estoppel was also bereft of merit and therefore failed.

**[53]** The court also finds that in the present case, since the summons was struck out for non-appearance of parties, it is not disputed that the suit was never heard on merit. This was confirmed by DW1 in cross-examination. As such, based on the authority of *Malayan Assurance Alliance Berhad* case, the plaintiff is not estopped from bringing this suit against the defendant.

**[54]** Learned counsel for the plaintiff argued that s. 115 of the Evidence Act 1950 will also apply against the defendant as he has by his actions intentionally caused BBMB and PW1 to believe that his attempts to settle, proposals and promises to regularise his accounts to be true and PW1 and BBMB had as a matter of fact, acted upon such a belief by deciding to cease legal action and instructing Messrs Halim & Ismail to withdraw the earlier Sessions Court suit. The defendant is now estopped from denying this.

**[55]** The court finds that the defendant's letters to BBMB no doubt caused PW1 to believe that he was serious in his promises to regularise his accounts. Consequently, BBMB altered its position to its detriment, in relying on the defendant's promises, by deciding to cease legal action and instructing Messrs Halim & Ismail to withdraw the then legal action against him (notwithstanding that ultimately the suit was struck off with liberty on 18 May 1999).

## The 2006 Notice Of Demand

**[56]** The defendant in his evidence contended that he never receives the 2006 demand. On this issue, learned counsel for the plaintiff in her submission pointed out that cl. 43.1 of the Overdraft Facility Agreement (p. 103 of BOD) provides that:

> any notice in writing required to be issued shall be deemed to have been sufficiently served on the Borrower if it is left **at the usual or last known place of residence or at the address above stated of the Borrower** or at the usual or last known place of employment of the Borrower or sent by ordinary mail to any of such addresses and in the last mentioned case the service shall be deemed to be made at the time when the letter would in the ordinary course of post be delivered.

**[57]** The plaintiff relies on the authority of *Malayan Assurance Alliance Berhad v. Then Fah Chin* [1997] 1 LNS 464 to support its contention that the letter of demand was sufficiently served on the defendant. In this case, the court held as follows:

> On the first issue raised by the defendant that no demand was made for payment of the sum that the plaintiff had paid out to the government in that the defendant had never received any notice of demand to that effect, Encik S Sivaneindiren for the plaintiff referred to the letter of demand addressed to the defendant

and the proof of posting thereof which were exhibited as exhibits "I" and "J" at enclosure (3) and submitted that ordinary post sufficed in the circumstances to show that the defendant had been duly served with the notice of [6] demand, citing *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 MLJ 413 in support of his contention.

**[58]** On this issue, cl. 43.1 provides that any demand may be effectively made by sending the notice to the defendant at his usual or last known address and any demand sent by post shall be deemed to have been sufficiently served. Thus, the plaintiff has discharged its duty by showing proof of posting of the 2006 letter of demand. The court also finds that the defendant is unable to show that the 2006 letter of demand was not addressed to him at his usual or last known address. In cross examination, the defendant admitted that he did not notify the plaintiff of the change of address. As such, in my judgment the defendant cannot deny having received the 2006 letter of demand.

## Whether The Certificate Of Indebtedness Has Proved The Plaintiff's Claim Of RM483,612.51

**[59]** The court will next deal with the issue of the amount due and owing by the defendant. In this case, PW2, an officer of the plaintiff has tendered a Certificate of Indebtedness which states that the amount outstanding as at 7 December 2006 is RM483,612.51. The plaintiff relies on cl. 29.1 of the Overdraft Facility Agreement dated 11 April 1997 in submitting that a statement of the Manager, Assistant Manager Accountant or any other officer of the plaintiff as to the amount of such balance shall be final and conclusive of the amount owed by the defendant. The Federal Court decision in *Cempaka Finance Bhd v. Ho Lai Ying* was cited by the plaintiff to support its contention that the amount is payable to the plaintiff.

**[60]** I have carefully perused relevant authorities pertaining to this issue. The decision in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 stemmed from a summary judgment application under O. 14 of the Rules of the High Court. The Federal Court, in allowing the appeal, found that the Court of Appeal had misapplied the relevant principles relating to an application for summary judgment when it required the plaintiff to give further evidence of indebtedness. It up held the certificate of

A indebtedness clause, also known as the conclusive evidence clause, and held that "there is nothing to indicate or suggest any manifest error on the face of the said certificate nor is there any fraud shown".

B **[61]** In the case of *Citibank N.A. v. Ooi Boon Leong* [1980] 1 LNS 168, His Lordship Raja Azlan Shah CJ (Malaya) (as His Highness then was), in lending support for a conclusive evidence clause, held as follows:

C > In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents ... It means that for the purpose of fixing liability of the respondents, the company's indebtedness may be as certained conclusively by a certificate.

D **[62]** Based on the above authorities, an exclusive evidence or conclusive evidence clause would have entitled the plaintiff solely on the certificate signed by an officer of the bank as conclusive evidence of the amount due and owing from the defendant where there is no manifest error on the face of the statement of E accounts or certificate.

**[63]** Accordingly, the court finds that based on this Certificate of Indebtedness and the evidence adduced by the plaintiff, that the plaintiff has proved the existence of facts in favour of its case. As F such, in line with and following the decision in *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31 and *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147, the burden shifts to the defendant to discharge the burden of proof.

G **[64]** The defendant have argued that the said Certificate of Indebtedness contains manifest error as follows:

(i) PW2 who is one of the signatories to the Certificate of Indebtedness was not at all material time in charge of the H computer. As such, the Certificate of Indebtedness does not comply with s. 90A(2) of the Evidence Act.

(ii) In giving evidence on exh. P39, PW2 did not disclose the mandatory disclosure required under s. 4 & 5 Bankers' Books (Evidence) Act 1949 and s. 34 of the Evidence Act 1950 I wherein there is no testimony that such entry in exh. P39 or

any of its admitted computer generated source (exhs. P35 & P36) is one of the ordinary books of the bank and made in the usual ordinary course of business, and that such figure was compared with the original entry for verification.

(iii) Further PW2 had admitted that pp. 114 to 134 of exh. P35 which contained transaction from January 1998 till September 1999 is actually a reprint and its original form is not produced.

(iv) PW2 had also testified on the existence of manual insertion in exh. P36.

**[65]** The court will now deal with the various allegations by the defendant in turn. PW2, Cik Nor Salleizah bt Sallehuddin, the bank officer of 18 years gave evidence that she is now the officer in charge and that she has examined all the plaintiff's documents, records, correspondences and also examined the computer records in respect of the defendant's overdraft facility. She also stated very clearly in evidence that the Statement of Accounts at pp. 114 to 198 were reprinted specifically for the proceedings at hand.

**[66]** The court notes that in cross-examination, the defendant's counsel put the following questions to PW2.

S: Kenapa transaksi sebelum merger dan penukaran nama boleh dikeluar di bawah letterhead Bumiputera-Commerce?

J: Statement of Accounts ini adalah merupakan cetakan semula selepas gabungan dengan menggunakan letterhead Bumiputra-Commerce.

S: Adakah rekod ini di dalam pengetahuan puan?

J: Setelah meneliti, ya.

**[67]** The court finds that the fact that the statement of accounts which are in the plaintiff's computer records and which PW2 testified that she has examined; were later re-printed on the Bumiputera-Commerce letterhead does not and cannot constitute a "manifest error".

**[68]** Further, the court notes that PW2 did not actually give evidence based on the re-printed Statement of Accounts which appears at pp. 114-201. Instead in her evidence, PW2 confirmed that she has actually examined the computer records.

**[69]** As such, PW2 gave evidence based on her direct examination of the computer records. She is thus a competent witness as the entire statement of accounts from the inception of the overdraft facility and the amount owing by the defendant as at 7 December 2006 are matters directly within her knowledge. Thus, the defendant's contention that the Certificate of Indebtedness does not comply with s. 90A(2) of the Evidence Act is without merit.

**[70]** The court notes that the first entry on the Statement of Account at p. 201 of bundle B shows that the outstanding amount as at 31 December 2006 is RM486,865.53. And whereas the Certificate of Indebtedness certifies that the amount outstanding as at 7 December 2006 is RM483,612.51.

**[71]** If we put these in chronological order as below, we can see that the:

- outstanding amount as at 30 November 2006 is RM482,663.71.
- outstanding amount as at 7 December 2006 is RM483,612.51 and
- outstanding amount as at 31 December 2006 is RM486,865.53

**[72]** Thus, the court finds that there is a flow in the accounts and it is very clear that the accounts are in order and there is no evidence of manifest in the Certificate of Indebtedness.

**[73]** With regard to the testimony of DW2 that exh. P36 contained hand written insertion as to the year by an unknown person, the plaintiff contend that the issue of alleged fraud and tempering of the accounts was never put to any of the plaintiff's witnesses. In this regard, the burden of proving fraud in a civil case is beyond reasonable doubt.

**[74]** Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt

(see *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 at 38, SC; *Lee Cheong Fah v. Soo Man Yoh* [1996] 2 BLJ 356; *Goh Hooi Yin v. Lim Teong Ghee* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48).

**[75]** The Federal Court in the case of *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497 states that it is well established law that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion or speculation merely. The court finds that from the evidence adduced, the defendant has not discharged this burden.

**[76]** Further, the court finds that the issue of fraud and tempering of account was never pleaded and put to any of the plaintiff's witnesses. In the case of *How Paik Too v. Mohideen* [1967] 1 LNS 57 which was referred to by the Court of Appeal in the case of *Arab Malaysian Finance Bhd v. Kah Motor Co Sdn Bhd & Another Case* [2010] 1 LNS 359; [2010] 5 MLJ 10, Ong Hock Thye FJ said at p. 52 as follows:

> In the first place, the point was never pleaded in the defence, consequently it was not a fact in issue requiring the magistrate to make any finding thereon.

## Conclusion

**[77]** In conclusion, the court finds that the plaintiff's claim is not precluded by limitation. Further the court finds that the plaintiff has succeeded in establishing its case against the defendant. Based on the Certificate of Indebtedness as at 7 December 2006 the amount outstanding as at that date is RM483,612.51. Accordingly, the court hereby orders the defendant to pay to the plaintiff the sum of RM483,612.51 and interest thereon at the rate of 8% per annum from the date of judgment until full settlement with costs.